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BS Eramaju Engineering Sdn Bhd v OPS Suria (EM) Sdn Bhd & Anor and another appeal

B COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NOS S-02(W)-834–05 OF 2015 AND S-02(W)-1075–06 OF 2015
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
8 MAY 2018

C *Civil Procedure — Trial — Agreed issues for trial — Parties formulated 21 agreed issues for trial — Trial judge reformulated and reduced agreed issues to three — Whether by doing so trial judge committed any error which affected validity of his judgment — Whether issues proposed by parties overlapped substantially — Whether issues identified by trial judge materially encapsulated those proposed by parties and were sufficient for fair and speedy disposal of case — Whether entry of judgment for sum larger than what was actually due did not render judgment null and void — Whether judgment sum could be amended to reflect real figure without prejudicing parties*

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E *Legal Profession — Retainer — Authority — Whether circumstances showed plaintiff could rely on ostensible authority of defendant's solicitor to negotiate and enter into settlement agreement — Whether solicitor had express or implied authority to bind his client contractually to another party — Whether solicitor's authority to bind his client contractually was defined by scope of his instructions and was question of fact*

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The first respondent ('R1') contractor and the appellant were involved in negotiations to settle disputes between them over a building contract. The appellant had involved its solicitor, the second respondent ('R2') to liaise with R1's solicitor in the negotiations. The instant appeal emanated from an action R1 had filed against the appellant and R2 claiming that the negotiations that took place between its solicitors and R2 had resulted in a binding settlement agreement under which the appellant was to pay R1 RM5,035,292,27. The appellant, however, contended that it never authorised R2 to enter into the settlement agreement. R2, on the other hand, pleaded in his defence that he was authorised by a representative of the appellant to negotiate to conclude a settlement agreement between the disputing parties. R2 counterclaimed against R1 for damages on the ground the claim against him was not bona fide and was an abuse of process of court. The High Court ruled that a binding settlement agreement had in fact been concluded and it granted R1 judgment on its claim against the appellant for RM5,035,292.27 and dismissed R2's counterclaim. In its instant appeal against the decision, the appellant argued that the judgment had to be set aside because: (a) the figure of

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RM5,035,292.27 was more than what was due to R1 because the appellant had paid R1 a substantial sum in part payments after the writ was filed; (b) it was improper of the trial judge to have reduced to only three, the 21 agreed issues the parties had put forward for determination at the trial; and (c) R2 was not authorised to negotiate and conclude the settlement agreement on the appellant's behalf. In a separate appeal, R2 contended that the trial judge wrongly held that he had no written authority from the appellant to commit it to the settlement agreement.

Held, unanimously dismissing the appeals and reducing the judgment sum payable to R1 to RM3,922,192.27:

(1) During the trial, R1 had admitted that it had received partial payments after the writ was filed and had prayed for judgment for a lesser amount to be entered in its favour. R1 had been paid RM1,311,000 out of the claimed sum. However, the trial court had awarded the original claimed amount without making any deductions. A judgment for a greater sum than the amount actually owed did not render the judgment null and void. Since the mistake was purely due to an oversight and could be corrected without prejudice to the parties, the judgment sum was amended to RM3,922,192.27 to reflect R1's claim less the payments that were received after the filing of the writ (see paras 43–47).

(2) The numerous issues the parties had formulated for the trial overlapped substantially and could have overwhelmed the trial judge. The disputes between the parties were capable of being disposed of within the confines of the three issues as reformulated by the trial judge without prejudicing the parties. The agreed issues as reformulated were materially the same and were within the four walls of the overall issues as proposed by the parties. None of the relevant and important issues were left out. It was apparent that the trial judge had gone through the pleadings and extracted the issues correctly and sufficiently to dispose of the case fairly and expeditiously (see paras 50–53).

(3) As between the appellant and R1, the trial judge correctly found that R2 was authorised to represent the appellant in the negotiations for the settlement of the disputes and therefore the appellant was bound by the settlement reached between R2 and the R1's solicitor. In all the circumstances of the case, it was not unreasonable for R1 to have relied on R2's ostensible authority to negotiate and enter into a settlement on the appellant's behalf. As between the appellant and R2, there was ample evidence to suggest that R2 had the appellant's implied authority to bind the appellant in his negotiations with R1's lawyers (see paras 60–61, 66 & 68–69).

(4) R2's appeal was not maintainable and was dismissed because, inter alia, there was no order or judgment made against R2 (see paras 73 & 75).

A **[Bahasa Malaysia summary**

Responden pertama ('R1') kontraktor dan perayu telah terlibat dalam perundingan untuk menyelesaikan pertikaian antara mereka berhubung kontrak bangunan. Perayu telah melibatkan peguamcaranya, responden kedua
B ('R2') untuk berhubung dengan peguamcara P1 dalam perundingan. Rayuan ini berpunca daripada tindakan R1 yang telah difailkan terhadap perayu dan R2 dengan menuntut bahawa perundingan yang telah diadakan antara peguamcaranya dan peguamcara R2 telah menghasilkan satu perjanian penyelesaian yang mengikat di mana perayu hendaklah membayar R1
C RM5,035,292,27. Perayu, bagaimanapun, menegaskan bahawa ia tidak memberi kuasa kepada R2 untuk memasuki perjanjian penyelesaian itu. R2, sebaliknya telah mempli dalam pembelaannya bahawa dia telah diberi kuasa oleh wakil perayu untuk berunding bagi memuktamadkan satu perjanjian penyelesaian antara pihak-pihak yang dipertikaikan. R2 telah menuntut balas
D terhadap R1 untuk ganti rugi atas alasan tuntutan terhadapnya bukan bona fide dan adalah penyalahgunaan proses mahkamah. Mahkamah Tinggi telah memutuskan bahawa sebenarnya satu perjanjian penyelesaian yang mengikat telah dibuat dan ia memberikan R1 penghakiman berhubung tuntutannya terhadap perayu untuk RM5,035,292,27 dan menolak tuntutan balas R2.
E Dalam rayuannya terhadap keputusan tersebut, perayu telah berhujah bahawa penghakiman it perlu diketepikan kerana: (a) jumlah RM5,035,292.27 adalah melebihi daripada apa yang kena dibayar kepada R1 kerana perayu telahpun membayar R1 sejumlah yang besar secara bayaran mengikut bahagian selepas writ difailkan; (b) ia tidak wajar untuk hakim perbicaraan mengurangkan
F kepada tiga sahaja, daripada 21 isu yang dipersetujui oleh pihak-pihak untuk dikemukakan bagi keputusan mahkamah; dan (c) R2 tidak diberi kuasa untuk berunding dan memuktamadkan perjanian penyelesaian itu bagi pihak perayu. Dalam rayuan berasingan, R2 menegaskan bahawa hakim perbicaraan terkhilaf kerana memutuskan bahawa dia tiada kuasa bertulis daripada perayu
G untuk melaksanakannya terhadap perjanjian penyelesaian itu.

Diputuskan, sebulat suara menolak rayuan-rayuan dan mengurangkan jumlah penghakiman yang kena dibayar kepada R1 kepada RM3,922,192.27:

H (1) Semasa perbicaraan, R1 mengakui bahawa ia telah menerima sebahagian bayaran selepas writ difailkan dan telah memohon untuk penghakiman jumlah lebih rendah dimasukkan menyebelahinya. R1 telahpun dibayar RM1,311,000 daripada jumlah yang dituntut. Walau bagaimanapun, mahkamah perbicaraan telah mengawardkan jumlah asal yang dituntut tanpa membuat apa-apa potongan. Satu penghakiman untuk jumlah
I lebih besar daripada jumlah yang sebenarnya berhutang tidak menjadikan penghakiman itu terbatal dan tidak sah. Oleh kerana kesilapan itu semata-mata kerana kesilapan yang tidak disengajakan dan boleh diperbetulkan tanpa prejudis kepada pihak-pihak, jumlah penghakiman telah diawardkan kepada RM3,922,192.27 untuk

menunjukkan tuntutan R1 telah dikurangkan daripada bayaran yang telah diterima selepas pemfailan writ itu (lihat perenggan 43–47).

(2) Pelbagai isu yang dirumuskan oleh pihak-pihak untuk perbicaraan adalah bertindih dengan ketara dan boleh menyebabkan hakim perbicaraan rasa terbeban. Pertikaian antara pihak-pihak mampu dilupuskan yang dihadkan kepada tiga sepertimana dirumuskan semula oleh hakim perbicaraan tanpa memprejudiskan pihak-pihak. Isu-isu yang dipersetujui sepertimana dirumuskan semula sama pentingnya dan merangkumi keseluruhan isu-isu sebagaimana dicadangakan oleh pihak-pihak. Tiada isu-isu yang relevan dan penting yang tertinggal. Ia jelas bahawa hakim perbicaraan telah meneliti pliding dan mengekstrakkan isu-isu sewajarnya dan memadai untuk menyelesaikan kes secara adil dan cepat (lihat perenggan 50–53).

(3) Antara perayu dan R1, hakim perbicaraan mendapati bahawa R2 telah diberi kuasa untuk mewakili perayu dalam perundungan untuk penyelesaian pertikaian dan oleh itu perayu terikat oleh penyelesaian yang dicapai antara peguamcara R2 dan R1. Dalam apa pun keadaan kes, ia bukannya tidak munasabah bagi R1 bergantung kepada kuasa zahir R2 untuk berunding dan memasuki penyelesaian bagi pihak perayu. Antara perayu dan R2, terdapat keterangan yang mencukupi untuk mencadangakan bahawa R2 mempunyai kuasa tersirat perayu untuk mengikat perayu dalam perundingannya dengan peguam R1 (lihat perenggan 60–61, 66 & 68–69).

(4) Rayuan R2 tidak boleh dikekalkan dan ditolak keran, antara lain, tiada perintah atau penghakiman dibuat terhadap R2 (lihat perenggan 73 & 75).]

Notes

For cases on authority, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2168–2179.

For cases on trial in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 10881–11008.

Cases referred to

Gaymark Investments Pty Ltd v Nicholas and Sevasti Tsangaris and Emmanuel and Garfalia Gerakios No AP1 of 1986, SC (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

In the matter of HIH Limited (in liquidation); Smith & Ors v McGrath & Ors; McGrath & Ors [2014] NSWSC 922, SC (refd)

Layang-layang Helicopters Sdn Bhd v NCT Helicopters Sdn Bhd [2014] MLJU

1911; [2014] 1 LNS 1426, HC (refd)
McEwan [2005] Ltd v Sharp Tudhope [2009] NZHC 706, HC (refd)
OPS Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise and 2 Ors (Suit No 22–9 of 2010–111) (unreported), HC (refd)
Ops Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise Sdn Bhd [2012] 9 MLJ 159, HC (refd)
Teh Eok Kee & Anor v Tan Chiah Hock & Anor [1995] 3 MLJ 613; [1996] 2 CLJ 227, FC (refd)

Legislation referred to

Evidence Act 1950 s 29
Advocates Ordinance (Cap 110) s 16(1)(a)

Appeal from: Suit No SDK 22–16/4 of 2012 (High Court, Sandakan)

Norbert Yapp (Eow Ee Pei with him) (Norbert Yapp & Assoc) for the appellant.
Francis Wong Kum Heng (Roweina bt Rasid with him) (William Liaw Chan & Co) for the first respondent.
Zaleha bt Mohd Yusuf Pan (Peter Lo & Co) for the second respondent.

Ahmadi Asnawi JCA:

[1] Civil Appeal No S-02(W)-834–05 of 2015 is the appellant/first defendant's appeal against the decision of the High Court allowing the first respondent/plaintiff's claim for the sum of RM5,035,292.27 arising out of an alleged breach of a settlement agreement between the first respondent/plaintiff and the appellant/first defendant and the second respondent/second defendant.

[2] Meanwhile, Civil Appeal No S-02(W)-1075–66 of 2015 is the second respondent/second defendant's appeal against the decision of the High Court that the second respondent/second defendant did not have the authority to propose and negotiate a settlement agreement with the first respondent/plaintiff on behalf of the appellant/first defendant.

[3] The parties shall hereinafter be referred as they were in the court below.

BACKGROUND FACTS

[4] In the year 2008, the Ministry of Education started a school electrification project to supply electricity to rural schools in Sabah using the solar hybrid system. The project is to be implemented in phrases or packages.

[5] The plaintiff (OPS Surai (EM) Sdn Bhd) is a private limited company based in Kuching, Sarawak and was involved as contractors in the implementation of the said solar hybrid project.

[6] The first defendant (BS Eramaju Engineering Sdn Bhd (formerly known as Ayuda Engineering Services Enterprise Sdn Bhd)) is a private limited company incorporated in Malaysia and was formed principally to tender for the said solar hybrid project. The first defendant claimed that at the material time they had only secured the award for packages 11 and 12 of the said project.

[7] The second defendant, Balbir Singh s/o Shingara Singh, is an advocate of the High Court at Malaya and practicing as a sole proprietor under the firm name of M/s Wan Balbir & Assoc. He was purportedly engaged by the first defendant to act as their solicitor in the ensuing dispute between the plaintiff and the first defendant.

[8] The learned trial judge found that the first defendant had been awarded the contract to build a power plant under package 4 of the project by the Ministry of Education/government. Thereafter, the plaintiff was appointed as its turnkey contractor by the first defendant to supply and build the said project pursuant to an agreement dated 28 May 2008.

[9] As the project progressed, a dispute arose between the plaintiff and the first defendant on issues of contract payments, wherein the said dispute was subsequently referred to arbitration.

[10] Sometimes in January 2010, the plaintiff commenced a civil action through its Kuching solicitors, M/s TC Chong & Co, against the first defendant and two others in the High Court at Kuching vide Suit No 22–9 of 2010–111 ('the first suit') because the plaintiff was unable to collect the contract payments due to it from the first defendant.

[11] The relief sought in the first suit was a mandatory order for the defendants to open a collection account in their joint names instructing the government to pay all future progressive claims into the joint account and to give standing instruction to the bank to deduct 60% of the money credited into the joint account. There was also a monetary claim of RM5,176,200 against the defendants.

[12] The first defendant, however, claimed that it was not a party to the first suit. The suit was against three defendants, namely Ayuda Engineering Services Enterprise ('AESE'), Hj Nordin bin Karto and Mohammad Nazri bin Norlan. The first defendant contended that AESE is a separate entity altogether and that the learned trial judge had erroneously treated AESE and the first

defendant as if they were one and the same legal entity. The first defendant reaffirmed that the first suit has nothing to do with the first defendant at all.

[13] The first defendant further stated that the said suit was in respect of a subcontract agreement dated 28 May 2008 entered between the plaintiff and AESE over package 4 of the solar hybrid project. The plaintiff filed the suit because it was unable to collect the contract sum which was due to it from AESE. Judgment in default of appearance was entered against AESE and Mohammad Nazri bin Norlan on 25 March 2010.

[14] Sometimes in June 2010, the plaintiff through the same firm of solicitors filed a writ of summons against the first defendant in the High Court at Kuching, Sarawak, vide Suit No 22–11 of 2010–111 ('the second suit'), alleging that prior to the award of the said project by the Ministry of Education, the first defendant had entered into an agreement with the plaintiff to appoint the plaintiff as their subcontractor for the execution of the said project as awarded by the Ministry of Education. Correspondingly, the plaintiff applied to injunct the first defendant from executing the project with a third party, to wit Kombinasi Solar Bhd, and damages to be assessed.

[15] However, the first defendant stated that at the material time the second suit was filed in court, the first defendant had already subcontracted the works to Kombinasi Solar Bhd. The injunction application was subsequently dismissed by the High Court at Kuching on 12 January 2011. The suit against the first defendant was, however, discontinued only in May 2012 after the case was transferred to the High Court at Sandakan.

[16] Be that as it may, nevertheless pursuant to the second suit, negotiations to settle the dispute amicably were carried out between the plaintiff and the first defendant with the involvement of the second defendant, who had represented himself to the plaintiff/its solicitors that he was authorised by the first. defendant to negotiate for the amicable settlement of both suits that were still pending.

[17] The plaintiff subsequently filed the present suit against the first defendant on 8 September 2011, premised upon the allegation that the second defendant was authorised by the first defendant to negotiate for the settlement of the first and second suits still pending in the High Court on its behalf and that a 'settlement' was concluded by the exchange of letters dated 8 July 2010 from the second defendant as solicitor for the first defendant to M/s TC Chong & Co, the solicitor for the plaintiff and another letter dated 12 July 2010 from M/s TC Chong & Co to the second defendant.

[18] It was also the plaintiff's case that as part of the settlement agreement, it was agreed that the plaintiff shall be paid a settlement sum amounting to RM5,176,200 and the said settlement sum shall be paid by AESE, one of the defendants in the first suit, executing a deed of assignment assigning to the plaintiff the remaining contract payments due from the government to the first defendant, if any. On its part, the first defendant had agreed to issue a deed of undertaking to pay the difference between the sum of RM5,176,200 and the monies received, if any, under the deed of assignment.

[19] The plaintiff had further claimed that the first defendant had breached the alleged settlement agreement in failing to issue the said deed of undertaking and to pay the differential sum of RM5,035,292.27 within 12 months of the date of the purported settlement.

[20] The first defendant countered that the second defendant had no authority to enter into the purported settlement agreement on its behalf with the plaintiff and hence the said settlement agreement does not bind the first defendant.

[21] It was also the first defendant's contention that it did not appoint the second defendant to represent the first defendant in the second suit as the second defendant has no right of audience before the High Court at Kuching. Accordingly, the plaintiff's solicitor ought to have known that any negotiation for settlement of the second suit should be with M/s Lai & Co, who was the solicitors on record acting for the first defendant in the second suit.

[22] In so far as the second defendant is concerned, it was his contention that one Michael Kwan, a representative from the first defendant's office had held out to him and the plaintiff that he had the authority to commit the first defendant to a settlement. It was also averred that he was duly authorised by AESE and the first defendant to negotiate a settlement of the two pending suits. The warrants of appointment, were issued by AESE and the first defendant on 16 March 2009 and 6 April 2009 respectively.

[23] The second defendant also claimed that in the course of his retention, he was directed by the said Michael Kwan to assist them in the negotiations for the settlement. The drafting of the settlement agreement was done with the full knowledge of the first defendant's directors who were asked to comment and update on the progress of the settlement. He averred that he was given the mandate to negotiate and settle the civil suits, on behalf of the first defendant by Michael Kwan.

[24] The second defendant further filed a counter claim against the plaintiff, the first defendant, Kwan Hiuang @ Kwan Huang Cheng (Michael Kwan) and

Mohd Nazri bin Norlan, claiming that they had represented to him that they had the authority from the first defendant when in fact they do not. As against the plaintiff, the second defendant claimed that the plaintiff's claim against him is not bona fide and is an abuse of the process of the court and pleaded for damages to be assessed. In the event, this counterclaim was dismissed by the learned trial judge.

DECISION OF THE TRIAL JUDGE

[25] In his decision, the learned trial judge reformulated the issues to be tried between the parties into three principal issues, as enumerated below:

(a) whether there was a concluded settlement reached between the plaintiff and the second defendant and whether the settlement between them was in the form of settlement agreement dated 26 August 2010 or was the settlement concluded via two letters, one dated 8 July 2010 from the second defendant's firm (letter of offer) and the other dated, 12 July 2010 from the plaintiff's solicitor (letter of acceptance);

(b) whether the second defendant had the authority to settle the dispute between the plaintiff and the first defendant; and

(c) whether the first defendant was bound by the terms of the settlement and whether the second defendant was liable in making the offer as per letter dated 8 July 2010.

[26] In regard to the *first issue*, the learned trial judge found, based upon a series of letters and e mails between the parties concerned, that there was indeed a concluded settlement between the parties herein. The learned trial judge considered the final letter of offer dated 8 July 2010 from the second defendant (M/s Wan Balbir & Assoc) at p 1576, Vol 5 (Part C) record of appeal ('RA') and the acceptance of the said offer by the plaintiff's solicitor (M/s TC Chong & Co) vide letter dated 12 July 2010, at p 1579, Vol 5 (Part C) RA, as the final instrument that cemented the settlement agreement.

[27] For purposes of clarity, we reproduced below the relevant segments of the second defendant's letter (dated 8 July 2010) wherein the title of the said letter clearly refers to the first and second suits at Kuching High Court and also the arbitration proceedings preceding the two suits:

> ...
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> 2. We inform that after further discussion, our clients have reverted with the following proposal taking into account your client's concerns. All references to Ayuda Enterprise shall mean Ayuda Engineering Services Enterprise. All references to Ayuda S/B shall refer to Ayuda Engineering Services Enterprise Sdn. Bhd.
>
> 3. ...

4. Our revised proposal is as follows:

4.1 Under the first suit, Ayuda Enterprise shall pay or cause to be paid to OPS Suria Sdn. Bhd. the sum of RM5,176,200 only ('the settlement sum') Ayuda Enterprise shall execute a deed of assignment for the contract undertake by your client for all remaining payments. Your client shall discharge all other outstanding matters due under that contract. The release of the payment in your clients favor shall be irrevocable and binding on our client Ayuda Enterprise.

4.2 As regard to differential between the sum of RM5,176,200 and the monies received under the Deed, Ayuda S/B shall issue an undertaking to pay the differential within 12 months from the date of the settlement.

4.3 The Principal Officer of Ayuda S/B, Encik Nazri bin Norlan shall give his personel guarantee for the indebtedness of Ayuda S/B in addition to its corporate undertaking to the settlement of the differential.

4.4 Both parties shall by consent stay the Arbitration proceedings pending the settlement of the First Contract.

5. As regard the Second Suit, Ayuda S/B shall without admission of liability and on an ex gratia basis pay to OPS Suria Sdn. Bhd. the sum of RM40,000 and cost of RM25,000 upon the acceptance of the settlement hereof. The Second Suit shall be discontinued upon full payment of RM5,176,200 under the first suit, If necessary your client shall apply to stay all proceedings under the Second Suit.

6. ...

[28] Ayuda Engineering Services Enterprise Sdn Bhd referred to in the said letter as Ayuda S/B is the first defendant herein before us.

[29] It would appear that the settlement is a global settlement involving both the first and second suits as well as the matter pending before the arbitrator over the same dispute.

[30] Meanwhile, the plaintiff's solicitor replied as follows vide their 12 July 2010 letter:

Thank you for your letter of 8th July, 2010.

Our client accepts the settlement in your above letter. Please, on an urgent basis, prepare the drafts for our vetting. We believe the settlement involves the following documents:

(1) Deed of Assignment.

(2) Letter of Undertaking (with duly passed resolution of Ayuda Engineering Services Enterprise Sdn Bhd annexed).

A (3) Letter of Guarantee.

On our part, we shall apply to stay the proceedings. Any consent required from any third party including the consent from the government for the Deed OF Assignment and the stamping of the documents shall be your client's responsibility.

B **[31]** The learned trial judge found that the said second defendant's letter did not state that the terms of the settlement must be incorporated in a formal agreement but instead stated that his client (the first defendant) had reverted with certain proposals for the plaintiff's consideration and in response thereto, C the plaintiff had unequivocally accepted the said offer and instructed the second defendant to prepare the execution of the deed of assignment, letter of undertaking and letter of guarantee. The two letters showed the intention of the parties to amicably settle their disputes. There was therefore no ambiguity in these letters and they clearly spelt out the intention of the parties to be D bound.

[32] The learned trial judge further opined that the intention of the parties to be bound by the terms of the said letters were reflected by the fact that the first defendant had subsequently executed the deed of assignment (Vol 5 E (Part C) pp 1592–1595) and the letter of guarantee (Vol 5 (Part C) pp 1587–1606). Nevertheless, a settlement agreement (Vol 5 (Part C) pp 1586–1591) was executed between the plaintiff and the first defendant on 26 August 2010 and it was only after seeing this formal agreement that DW3 (Michael Kwan, one of the directors of the first defendant) decided to review F the terms of the settlement and later retracted their earlier agreement that the first defendant would give their letter of guarantee.

[33] Finally, it was the learned trial judge's findings that from the G construction of the said letters, it was the intention of the parties that there was a concluded contract between the parties and the first defendant was in breach of the said contract when it failed to execute the letter of undertaking in favour of the plaintiff.

H **[34]** On the *second issue* of whether the second defendant had the authority to settle the dispute between the plaintiff and the first defendant, the learned trial judge found that in the eyes of the plaintiff, the second defendant was perfectly authorised to represent the first defendant in the negotiation for the settlement of their disputes on account that:

I (a) the second defendant had a long professional relationship with DW3 ('Michael Kwan'), an officer and a member of the first defendant's Board of Directors and had acted for the first defendant on numerous occasions involving major disputes;

(b) it was the evidence of counsel for the plaintiff, Jonathan Chong ('PW2') that he was informed by the second defendant of Collin Lai's appointment as counsel for the first defendant in the first and second suits. The second defendant had been actively involved in the negotiations and was communicating with the plaintiff's solicitor and was the instructing solicitor for the first and second suits. Even Collin Lai, counsel for the first defendant, took instruction from the second defendant;

(c) when the plaintiff initially rejected the second defendant's proposal for payment, it was the second defendant who forwarded the said letter to Mohd Nazri, a member of the first defendant's Board of Directors and informed that he ('the second defendant') would give his views (Bundle C(1) pp 302–304 and Bundle F(2) pp 191–194);

(d) after the plaintiff accepted the first defendant's proposal vide letter dated 12 July 2010, the second defendant sent an e-mail to Michael Kwan and Mohd. Nazri informing them that he had received the format of the deed of assignment form from MOE (Ministry of Education) for the drafting of the said deed of assignment pursuant to the settlement agreement (Vol 5 (Part C) pp 1586–1591);

(e) after the plaintiff had accepted the proposed terms of settlement the second defendant sent an e mail to Jonathan Chong and copied to Collin Lai, attaching the finalised draft settlement agreement, deed of assignment and the letter of guarantee asking whether there are amendments to be made before the documents could be executed by the parties;

(f) the second defendant also said that he had discussed the proposed settlement with Michael Kwan and proceeded to draft the proposed settlement and gave a copy to Michael Kwan;

(g) on 25 October 2010, Collin Lai sent a text message to the second defendant informing him that Jonathan Chong had requested for the adjournment of the hearing of an interlocutory application in respect of the first and second suits, pending the settlement agreement. The second defendant told Collin Lai that he is agreeable to the adjournment;

(h) the aforesaid series of communication between the second defendant, Jonathan Chong, Michael Kwan and Collin Lai showed that the second defendant had been in communication with the plaintiff and Michael Kwan, also a director of the first defendant, is aware of the progress of the settlement agreement; and

(i) the second defendant's testimony that his relationship with Michael Kwan ('DW3') since 2007 had established a degree of trust and he

would act on DW3's instruction even when there are no written instruction from DW3. The second defendant also testified that he was initially engaged by the first defendant to defend them in the first and second suits. However, since he was not admitted to practice in Sarawak, the first defendant then engaged the services of Collin Lai of M/s Lai & Co to act for them.

[35] Based upon the above, the learned trial judge opined that it was not unreasonable for the plaintiff to infer that they could rely on the ostensible authority of the second defendant to negotiate and enter into a settlement with the first defendant. Consequently, the learned trial judge ruled that the second defendant had the authority to negotiate and propose a settlement with the plaintiff on behalf of the first defendant. Hence, the first defendant was bound by the terms of the settlement as per letter dated 8 July 2010. The learned trial also applied the rulings in *McEwan [2005] Ltd v Sharp Tudhope* [2009] NZHC 706 and *Gaymark Investments Pty Ltd v Nicholas and Sevasti Tsangaris and Emmanuel and Garfalia Gerakios* No AP1 of 1986 to fortify the position he had taken. In the latter case, it was ruled that:

> What I think in question in this case is counsel authority, as between himself and his opponent, to bind his client to an agreement of compromise, as distinct from his actual or implied authority, as between himself and his client, to do so.

[36] As regards to whether the second defendant had acted without the authority of the first defendant when the settlement agreement was agreed upon, and to commit the first defendant to substantial liability of about RM5m, the learned trial judge opined that no such written instruction was given by the first defendant to the second defendant and hence, the second defendant should not be permitted to rely on any verbal instruction as it would not be consistent with s 29 of the Evidence Act 1950 On the balance of probabilities, the learned judge found that the second defendant has no authority to settle the dispute between the plaintiff and the first defendant. The learned judge relied on the decision *In the matter of HIH Limited (in liquidation); Smith & Ors v McGrath & Ors; McGrath & Ors* [2014] NSWSC 922, that such authority must be given in writing.

[37] In respect of the *third issue*, to wit, whether the first defendant is bound by the terms of the settlement and whether the second defendant is liable in making the offer as per letter dated 8 July 2010, the learned trial judge opined that based on the series of letters between the second defendant, Michael Kwan, the plaintiff's solicitor and the defendant's solicitor, it would not be in the interest of justice to set aside the settlement that had been reached between the parties on account that Michael Kwan, a director of the first defendant, had been actively involved in the negotiations. He was constantly notified by the second defendant on the progress of the negotiations and the second defendant

had also consulted and sought the input of Michael Kwan before the 8 July 2010 letter was sent to the plaintiff's solicitor. In addition, throughout the series of negotiations, there was no protest lodge by the first defendant through Michael Kwan.

[38] Only when the settlement agreement was executed between the plaintiff and first defendant on 26 August 2010 and after seeing the formal agreement that DW3 decided to review the terms of the agreement and later retracted the agreement that the first defendant would give their letter of guarantee.

[39] The learned judge further found that the second defendant was not liable to the plaintiff even though he has acted without the express authority of the first defendant because all along the first defendant was aware of the negotiations for settlement with the plaintiff, only to retract it after it was concluded.

THE APPEALS

[40] All the parties to the suit lodged separate appeals against the said decision of the learned trial judge.

[41] The first defendant's appeal (Civil Appeal No S-02(W)-834–05 of 2015) is against the plaintiff and the second defendant and it canvassed the following grounds:

(a) the sum awarded by the learned judge was in excess of what was due to the plaintiff;

(b) the learned judge erred in law and in fact when the agreed issues to be tried between the plaintiff and first defendant was reformulated to only three issues from the original 21 issues; and

(c) the second defendant is not authorised to compromise the second suit or conclude the alleged settlement agreement on behalf of the first defendant.

[42] The cross-appeal by the plaintiff is fixated on the following grounds:

(i) if the appeal by the first defendant is allowed and the High Court order is set aside, the second defendant do pay the plaintiff the sum of RM3,922,192.27 together with interest thereon at 4%pa from the date of judgment to date of full payment and costs of RM80,000; and

(ii) if the appeal by the first defendant is dismissed, the order of the High Court dated 24 April 2015 which reads 'plaintiff's claim against the first defendant in terms of the statement of claim is allowed' be varied to read 'plaintiff's claim against the first defendant is allowed in the sum of

A RM3,922,192.27 together with interest thereon at 4%pa from the date of judgment to date of full settlement and costs of RM80,000 paid by the first defendant to the plaintiff'.

OUR DECISION

B

The first defendant's appeal and the cross appeal by the plaintiff

Ground (i) — The judgment sum awarded was in excess of what was due to the plaintiff

C

[43] Learned counsel for the first defendant submitted that the learned trial judge had awarded a sum in excess of what was due to the plaintiff. The plaintiff had actually been paid the amount of RM1,311,000 out of the sum claimed, leaving a balance of RM3,922,192.27 as reflected in the plaintiff's cross-appeal D to vary the judgment sum in terms of the statement of claim. The learned trial judge was in error when he held that the plaintiff is now claiming for the sum of RM5,035,292.27, being the balance of the amount due to the plaintiff. It was submitted that on this ground alone, the decision of the learned trial judge is flawed and ought to be wholly set aside.

E

[44] In the course of the trial, the plaintiff had acknowledged and admitted that it had received partial payments after the writ was filed pursuant to the deed of assignment and had asked for a lesser amount to be entered in its F favour. However, the original amount without the deductions was instead awarded.

[45] In our view, a judgment for a greater sum than the amount actually owed does not render the judgment null and void. It is our further view that G such larger sum that was entered into was purely due to an oversight on the part of the learned trial judge to deduct the sums already paid from the total judgment sum. There can be no other explanation to account for this anomaly.

[46] It is trite that in such event, the law courts has always been empowered H to amend the order accordingly where adjustments can be made to reflect the actual amount owed and due and none would have been prejudiced as it now involved a lesser sum. It is also in the best interest of justice to make such necessary adjustments.

I **[47]** As such, we opined that this ground of appeal is devoid of any merit and we unhesitatingly dismissed the same. Correspondingly, we adjusted the judgment sum awarded to the plaintiff to an amount reflective of the plaintiff's claim less the partial payments already paid after the writ was filled, to wit RM3,922,192.27 only.

Ground (ii) — Reformulation of the agreed issues to be tried between the plaintiff and the defendants

[48] Learned counsel for the first defendant submitted that prior to the trial, the first defendant and the plaintiff had formulated 21 agreed issues to be tried amongst them. However, the learned trial judge found no issues to be tried and reformulated the agreed issues to only three issues. It was thus submitted that by doing so, the learned trial judge had shifted the issues. Hence, instead of the first issue of whether the second defendant was authorised to negotiate, the learned trial judge went on to find whether there was a concluded agreement. In addition, since the parties have agreed amongst themselves as to the issues to be tried based on the pleaded case, it would not be fair to the parties if the trial judge is to deduce his own agreed issues. Also, this is not a case where parties are unable to agree on the issues to be tried or had separately submitted issues to be tried.

[49] It was finally submitted that the learned trial judge had committed a fundamental error and on account of the same, the judgment cannot stand.

[50] We have examined the issues. The agreed issues to be tried for the main trial came to about 21 issues, whereas as between the plaintiff and the first defendant there were eight issues and between the plaintiff and the second defendant, 13 issues were involved. As for the counterclaims, there were a total of 24 issues. Apparently, the issues overlapped substantially.

[51] In such event, it is not difficult to understand why the learned trial judge had reformulated the agreed issues to be tried in the manner he did. Otherwise, he would have been overwhelmed by the issues. In his grounds of judgment, at pp 1956–1957, supplementary record of appeal, the learned trial judge reasoned:

> There are no common issues to be tried that have been agreed upon by the parties herein. Each party has their own list of issues to be tried. This is evident from the written submissions filed by the respective counsels. I have examined the pleadings, the evidence adduced by the parties as well as the documentary evidence produced during the trial and of the opinion that the dispute herein can be determined based on the following main issues, namely:
>
> (1) .....
> (2) .....
> (3) .....
>
> *as reproduced at para. 25, p. 12 of this judgment.*

[52] We were in agreement with the learned trial judge that the disputes herein can be disposed off within the confines of the three aforesaid issues as reformulated by the learned trial judge himself without causing any prejudice to any of the parties herein. We agreed that the 21 issues to be tried in the main trial and 24 issues for the counterclaims substantially overlapped. The agreed issues as reformulated by the learned trial judge are materially the same and were within the four walls of the overall issues as proposed by the parties, except that the issues as now reformulated by the learned trial judge are a lot more leaner, concise, plain and direct to the point. None of the relevant and important issues though were left out.

[53] In the final analysis, it is apparent that the learned trial judge had gone through the pleadings and evidence adduced and had extracted the issues correctly and sufficiently to dispose off the case. In all the circumstances of the case, he is entitled to do so, principally, for the expeditious and fair disposal of the case — see *Layang-layang Helicopters Sdn Bhd v NCT Helicopters Sdn Bhd* [2014] MLJU 1911; [2014] 1 LNS 1426.

[54] In the event, we found the current issue equally devoid of any merit.

Ground (iii) — The second defendant is not authorised to compromise the second suit or conclude the alleged settlement agreement on behalf of the first defendant

[55] Learned counsel for the first defendant submitted that the primary issue raised in the pleading was whether the first defendant had appointed or authorised the second defendant to negotiate and enter into any settlement on its behalf with the plaintiff in respect of the second suit.

[56] It was further submitted that on the evidence as adduced before the court, the learned trial judge was correct to find that the second defendant was not authorised to compromise a settlement on behalf of the first defendant and that the second defendant did not have the express authorisation from the first defendant to commit it to a substantial settlement. Hence, on this finding alone, it was sufficient to dispose off this case in favour of the first defendant.

[57] Thus, it is submitted further that correspondingly, the learned trial judge's findings that there was a concluded settlement between the plaintiff and first defendant is contrary to his own finding that the second defendant is not authorised to compromise the settlement on behalf of the first defendant and that the second defendant did not have the express authorisation from the first defendant to commit the first defendant to the settlement.

[58] In addition, on the second defendant's retainer, the learned trial judge

found as follows, at pp 1972–1973 supp record of appeal:

> Hence the authority of a solicitor will be depended on the retainer and this aspect I am persuaded by the authority cited by learned counsel for the plaintiff (In the matter of *HIH Insurance Ltd (in liquidation); Smith & Ors v Mc Grath & Ors* [2014] NSWSC 922) that this authority must be given in writing.
>
> In this instant case the crux of the matter is whether or not the second defendant has the authority to commit the first defendant to substantial liability of about RM5 million. It is the second defendant's case that he has been given a written authority by the first defendant (Bundle F2 page 181); however this warrant obviously in respect of claim against OPS
>
> Suria (EM) Sdn. Bhd. Hence when the second defendant proceeded to accept the proposed settlement term from TC Chong & Advocates, it is not related to matters in their claim against OPS Suria. It is about committing the second defendant to pay. I am of the opinion that this is the only written instruction given by the first defendant to the second defendant and the second defendant should not be permitted to rely on any verbal instruction as it would not be consistent with section 92 of the Evidence Act. In the circumstances I rule that, on the balance of probability, the second defendant has no authority to settle the dispute between the plaintiff and the first defendant.

[59] Be that as it may, in our view, the learned trial judge did not take the simplistic approach a suggested by learned counsel for the first defendant but had however, taken the approach of dissecting the issue of authorisation into two parts, to wit:

(a) authorisation as between the plaintiff and the first defendant; and

(b) authorisation as between the second defendant and the first defendant.

[60] As between the plaintiff and the first defendant, the learned trial judge, based upon the grounds enumerated earlier in para 34(i)–(ix), pp 16–19 of this judgment, found that the second defendant is authorised to represent the first defendant in the negotiations for the settlement of their disputes and therefore the first defendant is bound by the settlement reached between the second defendant and the solicitor for the plaintiff, M/s TC Chong & Co.

[61] We were with the learned trial judge on the aforesaid findings by him. In all the circumstances of the case and the events leading to the conclusion of the settlement agreement and upon the strength of the letter dated 8 July 2010, we opined that it was not unreasonable for the plaintiff to infer that they could rely on the ostensible authority of the second defendant to negotiate and enter into a settlement on behalf of the first defendant.

[62] In addition, the evidence showed that Collin Lai, counsel on record for the first defendant, was informed of the negotiations and of the settlement

itself that was attempted and conducted by the second defendant and he did not at any time object to the second defendant's role in the negotiations whether before or after the settlement agreement was reached. The learned trial judge even found that Collin Lai had even advised the parties to comply with the settlement that was agreed upon.

[63] The events that ensued after the settlement agreement was reached further fortified the notion that the second defendant was authorised to negotiate a settlement agreement between the plaintiff and the first defendant and there was indeed a concluded settlement agreement between the two parties as found as a matter of fact by the learned trial judge. The execution of the deed of assignment and the letter of undertaking™ were in terms of the 8 July 2010 and 12 July 2010 letters as negotiated by the second defendant and the solicitor for the plaintiff.

[64] The titles of both these letters refers to the first suit (*OPS Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise and 2 Ors* (Suit No 22–9 of 2010–111) (unreported)); the second suit (*Ops Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise Sdn Bhd* [2012] 9 MLJ 159, now known as the first defendant) and the matter that was still pending arbitration between *OPS Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise*. Clearly, the settlement sought by the parties was global in nature to encompass all the suits that were still pending before the courts and arbitration. There can be no dispute that the first defendant was a party in the negotiations then in progress and the settlement that was finally achieved pursuant to the said agreement. There can also be no denying and was certainly within the knowledge of the first defendant that the second defendant was very instrumental in the said process of negotiations which resulted in the said settlement.

[65] In addition, a settlement agreement (at pp 1586–1591, Vol 5 (Part C) RA), was executed between the plaintiff and the defendants in the first suit on 26 August 2010. It was only after seeing this formal agreement that the first defendant, through DW3, decided to review the terms of the settlement and finally retracted their earlier agreement that the first defendant would give their letter of guarantee pursuant to the terms of the two letters dated 8 July 2010 and 12 July 2010. The terms of the proposed settlement vide the second defendant's letter dated 8 July 2010 which was carbon copied to his clients (the defendants in both suits) and accepted by the plaintiffs vide their 12 July 2010 reply, clearly implicate the first defendant in the settlement process, evinced at paras 4.1–4.4 of the 8 July 2010 letter. Although the said letter dated 8 July 2010 was carbon copied to the defendants, there was apparently no hostile response from them, expressing their objections or disagreements, in particular from the first defendant.

[66] As between the second defendant and the first defendant, the second defendant's authority to act for the first defendant in the negotiation process could either be expressed or implied. The law is trite that there is no such rigidity that the authority must be expressed in written form. It could be implicit in terms of the retainer and no formalities are required to constitute a valid retainer. It may be in writing or made orally or be inferred from the conduct of the parties therein. In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, the Federal Court ruled, at p 793 (MLJ); pp 739–740 (CLJ):

> [36] A solicitor-client relationship may arise either:
>
> (a) by an express agreement between a solicit and a client; or
>
> (b) where there is express assertion by a solicitor to act for the client; or
>
> (c) it may be implied.
>
> [37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:
>
> (a) that the purported client has sought for advice or assistance from the solicitor;
>
> (b) that the assistance sought for was within the profesional competence of the solicitor;
>
> (c) that the solicitor expressly or impliedly agree to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and
>
> (d) that it was reasonable for the purported client to believe that the solicitor was representing him.
>
> [38] It is therefore a matter of evidence to determine whether a solicitor-client relationship exists. Hence, it is essential to consider such evidence adduced including the words and conduct of the parties towards each other. It is also to be noted that fee arrangement or payment is not determinative of the existence of a solicitor-client relationship. Take for instance the case of the Minnesota woman who met a lawyer for less than an hour to consult on a possible claim for medical negligence. At that point in time only ten months was left before limitation would set in. No fee arrangement or authorisation to act was discussed. But the woman was left with the impression that her case was weak and that the lawyer would consult with others to discuss the case, only getting back to her if she had a viable claim. The woman did not hear from the lawyer even after a year past. So she consulted another lawyer but only to find that the statute of limitation had set in. The first lawyer was ultimately found liable and was ordered to pay a sum that the woman would have

received if she had timely proceeded with her case. But unilateral belief by a purported client that the solicitor would represent him or her would not suffice.

[67] Edgar Joseph Jr FCJ speaking for the Federal Court in *Teh Eok Kee & Anor v Tan Chiah Hock & Anor* [1995] 3 MLJ 613; [1996] 2 CLJ 227 postulated that it is a question of fact in each case, whether a solicitor has actual or ostensible authority to bind his client contractually. His authority is limited by his instructions, which is also a question of fact. The burden of proof of establishing such authority must rest on the party who alleges it.

[68] There are ample evidence though to suggest the existence of such implied authority for the second defendant to negotiate with the plaintiff on behalf of the first defendant. It is most discernible during the cross-examination of DW3, a member of the first defendant's board of directors when he admitted that he was aware of the negotiations and settlement process and the issues involved, but did not intervene to stop it nor register any objections. Also, there was almost total adherence of the terms of the settlement as proposed in the said two letters dated 8 July 2010 and 12 July 2010 but for DW3's last minute intervention, resulting in the retraction of the first defendant's initial agreement to issue the said letter of guarantee pursuant to the settlement agreement vide the aforesaid two letters.

[69] The factors taken into account by the learned trial judge enumerated in para 34(i)–(ix), pp 16–19, of this judgment are equally strong indicators of the second defendant's implicit authority to bind the first defendant.

[70] For all the reasons given, we were unanimous in our view that in so far as the plaintiff is concerned, they have entered into a valid binding contract with the first defendant. The dispute was only between the first and second defendants and not with the plaintiff.

[71] Henceforth, the first defendant's appeal was dismissed with costs quantified at RM10,000, subject to the payment of the allocator fee. Deposit was refunded to the first defendant.

The second defendant's appeal (Civil Appeal No S-02(W)-1075–06 of 2015)

[72] The second defendant's appeal is against the first defendant and the plaintiff and grounded upon the following issues:

(a) the learned trial judge erred in law and in fact when he found that the second defendant had the authority to negotiate and propose settlement with the plaintiff on behalf of the first defendant but did not have the

written authority to settle the dispute between the plaintiff and the first defendant ie to commit the first defendant to a substantial liability of RM5m; and

(b) that the settlement agreement formed by the exchange of the proposal letter dated 8 July 2010 issued by the second defendant's firm to the plaintiff's solicitor (M/s TC Chong & Co) constituted an instrument relating to proceedings in Sarawak court. YA Datuk Douglas Primus Sikayun had, on 22 January 2014, in an unrelated case ruled that since the second defendant was not admitted to practice in the State of Sarawak, he had breached s 16(1)(a) of the Sarawak Advocates Ordinance (Cap 110). The second defendant contended that there is no such breach and urged this court to purged the said ruling.

[73] We had no hesitation in dismissing ground (i) of the second defendant's appeal on account that there was no order nor any judgment issued against the second defendant. Hence, his appeal was not maintainable.

[74] We also had no hesitation in dismissing ground (ii) of the second defendant's appeal on account that the said ruling by YA Datuk Douglas Primus Sikayun was made in another proceeding not related with the present case before us. Hence, we decline jurisdiction to preside and hear the issue.

[75] The second defendant's appeal was therefore dismissed with cost at RM5,000 to each of the respondents (the plaintiff and first defendant) subject to payment of the allocator fee. Deposit was refunded to the second defendant.

[76] In view of the decision in Appeal No S-02(W)-834–05 of 2015, the plaintiff did not proceed with its cross-appeal as it had now become academic. The said cross-appeal was withdrawn without more.

Order accordingly.

Reported by Ashok Kumar